U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-255

SANTA FE PACIFIC RAILROAD COMPANY,
Petitioner,

v.

E. L. CORD and DONALD R. WHEELER, as Trustee,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court and the Court of Appeals of the State of Arizona

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INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statutory provision involved	2
Statement of the case	3
Reasons for granting the writ	14
1. The Sole Issue Remaining in This Litigation Has Already Been Determined by This Court to Be of Sufficient Importance to Grant Certiorari	14
2. The Decision Below Conflicts With the Decision of This Court in *Krug v. Santa Fe Pacific Railway Co.*, 329 U.S. 591 (1947)	14
3. The Decision of the Sole Issue in This Litigation Is Important to the Utilization of Public Lands and Important in Determining the Rights and Obligations of Parties, Including the United States, Under Statutes of the United States Relating to Rights Including Forest Lieu Selection Rights	17
Conclusion	19
Appendix A (Order of Arizona Supreme Court)	App. 1
Appendix B (Opinion of the Court of Appeals)	App. 2
Appendix C (Amendment to the Opinion of the Court of Appeals)	App. 28
Appendix D (Findings of Fact and Conclusions of Law, and Judgment)	App. 30

TABLE OF AUTHORITIES CITED

Cases	Pages
Krug v. Santa Fe Pacific Railway Co., 329 U.S. 591	8, 9, 14, 15, 17, 19

Statutes	
28 U.S.C. § 1254(1)	2
49 U.S.C. § 65	2
Transportation Act of 1940:	
§ 321	2
§ 321(b)	6, 7, 14
18 Stat. 194	8
33 Stat. 556	8
46 Stat. 257	11
69 Stat. 534	17
Public Law 88-545 (78 Stat. 751)	18

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Petition for a Writ of Certiorari to the Supreme Court and the Court of Appeals of the State of Arizona

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The Petitioner, Santa Fe Pacific Railroad Company, prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Arizona entered in this proceeding on March 15, 1971 and the order of the Arizona Supreme Court denying the Petitioner's petition to review which order was entered in this proceeding on June 9, 1971.

OPINION

The opinion of the Court of Appeals of the State of Arizona, not yet reported, is reproduced in Appendix B to

this petition. The order of the Supreme Court of Arizona, in its entirety, reads as follows: "Ordered: Petition for Review — Denied". There was no formal opinion of the trial court, the Superior Court of the State of Arizona in and for the County of Yavapai. The findings of fact, conclusions of law and judgment of the trial court are reproduced in Appendix D to this petition.

JURISDICTION

The judgment of the Court of Appeals of the State of Arizona was entered on March 5, 1971. A timely petition for rehearing before said court was denied on April 15, 1971. A timely petition for review was denied by the Arizona Supreme Court on June 8, 1971. This petition for certiorari was filed within ninety (90) days of that date. This court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Forest Lieu Selection Rights arising under the Act of June 4, 1897 were terminated under the provisions of § 321 (b) of the Transportation Act of 1940 and the release filed by Petitioner pursuant to that Act.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 49:

§ 65

"If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may

have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have ben granted to such carrier or any such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law."

STATEMENT OF THE CASE

The events which ultimately give rise to this lawsuit commenced on July 27, 1866. On that date, Congress, by statute, created the Atlantic and Pacific Railroad Company ("The Atlantic and Pacific") and gave it the right to build a railroad from Missouri to the Pacific coast. Under the terms of the same statute the Atlantic and Pacific received a grant of lands from the United States to aid in the construction of the railroad to be operated by it. The grant through the then territory of Arizona was to the odd numbered sections twenty miles on either side of the railroad line.

Petitioner ("the Santa Fe"), sometime prior to July 24, 1902, became the lawful successor in interest to the Atlantic and Pacific Railroad Company, and became fully vested with all of the lands granted to the Atlantic and Pacific under the Act of July 27, 1866.

The railroad and telephone lines were completed through the territory of Arizona and, accordingly, on or about July 24, 1902, the Santa Fe received patents to the lands included under the terms of the land grant made by the Act of June 27, 1866, including patents to all the "base lands", which term will be defined shortly. All of these parcels were, and are, within the limits of a federal forest reserve.

Meanwhile, in the late 1800's, the consolidation of forest reserves had been initiated, primarily from the public domain. Difficulties in consolidating reserves arose from the transfers of prior land grants, particularly those to land grant railroads. In order to effectuate such consolidations, on June 4, 1897, Congress passed an act providing that where lands which were subject to an unperfected bona fide claim or were patented were enclosed within the limits of a federal forest reserve, the owner could, if he desired to do so, "relinquish the tract to the Government, and . . . select in lieu thereof a tract of forest land open to settlement not exceeding in area the tract covered by his claim or patent."

The lands which were relinquished to the government under the Act of June 4, 1897 became known as, and will be referred to in this petition as, "the base lands". The rights which were secured as a result of such relinquishments became known as, and will be referred to in this petition as, "Forest Lieu Selection Rights."

The base lands involved in this litigation were located in what was in the early part of this century the San Francisco Mountains Forest Reserve and the Grand Canyon Forest Reserve. Prior land grants to the Atlantic and Pacific left only alternate sections for the reserves. Since the checkerboard nature of the reserves presented administrative problems, negotiations were commenced by the government to secure the railroad's relinquishment of its

forest lands. In 1902, the Santa Fe undertook, with the agreement of the Secretary of the Interior, to surrender its title to the odd numbered sections in these forest preserves. Correspondence setting out the agreement was exchanged between December, 1901, and July, 1902.

In 1905, Congress repealed the Act of June 7, 1897, insofar as it is related to Forest Lieu Selection Rights, but a saving clause preserved contracts theretofore entered into by the Secretary. On various dates up to approximately 1910, the base lands involved in this litigation were conveyed by the Santa Fe to the United States.

The Santa Fe decided to sell some of the rights it had acquired under the Act of June 4, 1897. Since these rights were not exercisable except in the name of the Santa Fe, a procedure was devised by which persons who wished to acquire the benefits of Forest Lieu Selection Rights could exercise those rights and receive title to land they had selected. Two powers of attorney were prepared and executed by the Santa Fe. One power of attorney authorized the attorney in fact to locate and select a parcel of land in lieu of the parcel (the base land) described in the power of attorney. Since all selections had to be made in the name of the Santa Fe, an additional power of attorney was issued which authorized the attorney in fact to convey in the name of the Santa Fe the lands selected in lieu of the relinquished lands. By this power of attorney, the holder of the power could convey the title to the selected land from the Santa Fe, to whom the United States would convey title, to himself or his nominee.

The names of the attorneys in fact were left blank. The powers of attorney involved here were issued between approximately 1902 and 1910. The names of the parties to whom the powers of attorney claimed by Respondents ("Cord and Wheeler") were first issued are known. Subse-

quent owners or purported owners and the methods and legality of transfers between them are totally unknown until Cord and Wheeler first acquired the powers they hold from their immediate predecessors in interest.

On September 18, 1940, Congress enacted the Transportation Act of 1940 ("the Act"). The Act provided certain benefits to those land grant railroads which complied with Section 321 (b) of Title III, Part II of the Act. This section provided:

> "If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, *a release of any claim it may have against the United States to* lands, interests in lands, *compensation, or reimbursement on account of lands* or interests in lands *which have been granted*, claimed to have been granted, or which it is claimed should have been granted *to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid*. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been

> fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law." (Emphasis supplied)

The meaning of the emphasized language is the sole issue remaining in this litigation. The Santa Fe contends, as it initially pled in its complaint in interpleader and in its answer to Cord's counterclaim and Wheeler's complaint, that Section 321 (b), and the particular language in the release discussed below, terminated the Forest Lieu Selection Rights arising from the base lands involved in this litigation. Since this is true, there were no Forest Lieu Selection Rights arising out of the base lands involved here in existence in 1955 or thereafter which would have been terminated by a reconveyance of the base lands by the United States to the Santa Fe or, indeed, in any other way. Thus, no cause of action rose in favor of Cord and Wheeler, as they allege, in 1955 or thereafter when the base lands were reconveyed to the Santa Fe.

On December 18, 1940, pursuant to the provisions of Section 321 (b) of the Act, the Santa Fe filed a release ("the Release") which read as follows:

> "Santa Fe Pacific Railroad Company, a corporation organized and existing by virtue of an Act of Congress approved March 3, 1897 (29 Stat. 622), with office and principal place of business at New York, in the State of New York, hereby, in accordance with Section 321 of Part II of Title III of the Transportation Act of 1940, and the rules and regulations issued thereunder by the Secretary of the Interior, relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefore on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Rail-

road Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

"This release does not embrace the rights of way or station grounds of this company, lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company of any predecessor in interest in aid of the construction of its railroad.

"In Witness Whereof, Santa Fe Pacific Railroad Company has caused this Release to be signed in its corporate name and acknowledged or proved by its President and its corporate seal to be hereunto affixed and the same to be attested by the signature of its Secretary this 17th December, 1940."

When the Santa Fe in 1940 executed and delivered the Release specified by the Act, it did not believe it had thereby terminated all of its unexercised lieu selection rights because thereafter, in 1943, it attempted to exercise certain of its lieu selection rights to select federal land. These lieu selection rights were not Forest Lieu Selection Rights, but were lieu selection rights arising out of similar contractual exchanges made under the Acts of 1874 and 1904, 18 Stat. 194; 33 Stat. 556. Santa Fe's applications to select were rejected by the General Land Office and the Secretary of Interior on the ground that such rights had been terminated by virtue of the Act and the Release executed and delivered pursuant to the Act. Santa Fe appealed to the courts, making essentially all the same arguments Cord and Wheeler make in this litigation. In 1947, this Court, in *Krug v. Santa Fe Pacific Railway Co.*, 329 U.S. 591, upheld the rejections of the applications on the ground that the

lieu selection rights had, in fact, been terminated by the Release delivered pursuant to the Act.

In summary, the principal events which had occurred prior to the time the *Krug* case was decided, were these. Santa Fe had conveyed certain lands (the baselands) to the United States in consideration for and in exchange for rights (Forest Lieu Selection Rights) to select other lands owned by the United States in lieu of the lands conveyed by the Santa Fe to the United States. The Santa Fe, through the use of powers of attorney, had empowered third persons to exercise its selection rights. These third persons had, in turn, transferred this package of rights to persons who were and are unknown. Those who had purchased from the Santa Fe its package of rights, and presumably any subsequent transferee, had paid for those rights. This Court determined in the *Krug* case that lieu selection rights had been terminated by the Release delivered pursuant to the Act.

Under these circumstances, the United States had received valuable consideration (the lands conveyed to it by the Santa Fe) in exchange for granting the rights to select other lands, but these rights had never been exercised and, under the *Krug* case, could never be exercised as they had been terminated by the Release signed by the Santa Fe.

The United States Forest Service, which had jurisdiction over all the base lands involved in this litigation, by virtue of said lands being in a national forest, felt that the United States' title to the base lands was less than perfect because the Forest Lieu Selection Rights received for the granting of said lands had never been exercised, and, therefore, the United States had never given consideration for the base lands. Under the *Krug* case, unexercised lieu selection rights had been terminated and, therefore, perfect title to the base lands could not be obtained by the selection of lieu lands.

However, if title to the base lands could be reacquired by the rightful owners, then the Forest Service could thereafter acquire perfect title from such persons by a new exchange or otherwise. In order to achieve this goal, employees of the Forest Service encouraged one Colonel Buehler, a retired Forest Service employee, to do what he could to get good title to these "lost lands", i.e. the base lands for selection rights which had never been exercised, in the hands of persons with whom the Forest Service could thereafter deal and, hopefully, negotiate a completely new exchange for the lands which had been the base lands for the terminated rights.

Colonel Buehler, encouraged by the Forest Service, saw an opportunity to perfect the government's title to these lost lands and to make a profit for himself in the process. He concluded that if he could get the United States to convey back to the Santa Fe the base lands which the Santa Fe had relinquished to the United States, the Santa Fe, in turn, could transfer these lands to the persons entitled thereto. In Colonel Buehler's judgment, the persons who were entitled to these lands were the original parties to whom the powers of attorney had been issued or their heirs or successors in interest. Under Colonel Buehler's plan, the heirs and successors in interest of the original holders of the powers of attorney, upon receipt of title to the base lands would transfer these lands to the Forest Service and, in return, would receive other lands owned by the government which could then be sold. Colonel Buehler entered into agreements with the heirs and successors in interest of the original holders of the powers of attorney under which agreements he was to attempt to obtain the base lands for his clients and for which he would eventually be compensated upon the sale of any lands received in exchange for the transfer to the Forest Service of the old base lands.

From the United States' point of view, if it quitclaimed the base lands to the Santa Fe, it was simply returning land (the base lands) for which it had paid no consideration and to which it, therefore, did not have good title. Indeed, Congress had passed a statute in 1922 and again in 1930 which expressly provided that where any person had relinquished base lands and had not received lands in lieu of the base lands, the Secretary of the Interior could relinquish and quitclaim to such person all the interest of the United States in the base lands. It was on the basis of the Act of 1930 (46 Stat. 257) that the United States was willing to and did quitclaim to the Santa Fe the base lands for the unexercised Forest Lieu Selection Rights.

From the point of view of the heirs of the original holders of the powers of attorney, by entering into arrangements such as were described above with Colonel Beuhler, they had an opportunity to receive an asset they otherwise would never have received.

Santa Fe had two reasons to proceed initially to cooperate with Colonel Buehler in his efforts. First, the Santa Fe wished to assist the Forest Service to acquire perfect title to the base lands within the National Forest. Secondly, the Santa Fe did not claim any beneficial interest in the base lands, and it wished to assist the persons entitled thereto to receive the land.

As a result of Colonel Buehler's requests the Santa Fe requested the United States to return certain base lands to it. Prior to April 1, 1955, after it had received certain of these lands from the United States, the Santa Fe conveyed a portion of these lands to the heirs of the original holders of the powers of attorney. Subsequent to April 1, 1955, the Santa Fe continued to receive from the government certain additional base lands, but anticipating future conflicting claims, it made no further conveyances of said lands.

On several occasions thereafter, Cord and Wheeler, in response to their inquiries, were advised, in substance, by certain employees of the United States that the Forest Lieu Selection Rights which they claimed were no longer valid as the base lands giving rise to such rights had been reconveyed by the United States to the Santa Fe. Subsequently, Cord and Wheeler filed damage actions claiming, in substance, that the Santa Fe, by reacquiring during the years 1955, 1956 and 1957 the base lands for their Forest Lieu Selection Rights had destroyed those rights.

Santa Fe took the position that the base lands which it had acquired from the United States pursuant to the Act of 1930 and to which it still held title were held by it in trust for the true owners of the Forest Lieu Selection Rights. However, both the heirs and the successors in interest to the original holders of the powers of attorney and certain persons, including Cord and Wheeler, who had physical possession of the powers of attorney and who claimed to own them, claimed that they were the true owners of the same Forest Lieu Selection Rights. In order to resolve this conflict and in order to protect itself from conveying the base lands it held to persons who were not entitled to them, Santa Fe filed an interpleader action in one of the two consolidated actions below in which it stated, in substance, that it held said lands in trust for the true owners of the Forest Lieu Selection Rights which had been terminated and asked the court to determine who these persons were.

Santa Fe asserted as a defense to Cord's and Wheeler's suits for damages that the Forest Lieu Selection Rights claimed by Cord and Wheeler were not destroyed upon the reconveyances of the base lands in the mid 1950's because such rights had been terminated by the Release filed under the Act in 1940. This contention, if correct, was a total defense to Cord and Wheeler's claim for damages for

destruction of Forest Lieu Selection Rights because Cord and Wheeler did not claim damages for termination of the Forest Lieu Selection Rights by virtue of the Release, probably because such claim had long since been barred by applicable Statutes of Limitation.

The trial court, instead of awarding the base lands to the owners of the terminated Forest Lieu Selection Rights (as the trial court found Cord and Wheeler to be), determined that the claimants should be awarded damages for destruction of their Forest Lieu Selection Rights, that Cord's and Wheeler's Forest Lieu Selection Rights were destroyed, not in 1940, upon the delivery of the Release, but in the mid 1950's when the base lands were reconveyed to the Santa Fe by the United States, and that Santa Fe, having been adjudged liable to pay damages for the destruction of the Forest Lieu Selection Rights, in effect, became the owner of the lands it had held in trust. The court awarded judgment in favor of Cord in the amount of $200,000.00 for the loss of his Forest Lieu Selection Rights to 1,000 acres and awarded judgment in favor of Wheeler in the amount of $59,472 for the loss of Forest Lieu Selection Rights to 297.36 acres. The Arizona Court of Appeals, in affirming the judgment of the trial court, held, in substance, that the Act and the Release did not terminate Cord and Wheeler's Forest Lieu Selection Rights because the base lands were patented and since patented lands are excluded from the effect of the Release required by the Act "it only makes common sense that any claims arising out of land which had already been patented are also excepted from the meaning of the Act."

REASONS FOR GRANTING THE WRIT

1. The Sole Issue Remaining in This Litigation Has Already Been Determined by This Court to Be of Sufficient Importance to Grant Certiorari.

In *Krug v. Santa Fe Pacific Railway Co.*, 329 U.S. 591, this Court said in its unanimous opinion: "Importance of the question decided caused us to grant certiorari." The sole issue in the *Krug* case was whether or not Section 321(b) of the Transportation Act of 1940 and the Release delivered pursuant to that Act terminated lieu selection rights under the Acts of 1874 and 1904. The sole issue in this case is whether Forest Lieu Selection Rights, lieu selection rights under the Act of 1897, were terminated by the identical section of the Act and the identical Release which were before this Court in *Krug*. The importance of the *Krug* case and this case is clearly equivalent and, accordingly, this Court, having previously determined that virtually the identical issue was important enough to grant certiorari, it follows that the importance of the question involved in this suit is such that certiorari should be granted.

2. The Decision Below Clearly and Directly Conflicts with the Decision of This Court in Krug v. Santa Fe Pacific Railway Co. 329 U.S. 591.

In *Krug v. Santa Fe Pacific Railway Co.*, 329 U.S. 591, Santa Fe had before this Court for interpretation the identical sentences of the Act which are before this Court in this litigation and the identical Release. Santa Fe was a party to the *Krug* case as it is a party to this case. The only difference between the *Krug* case and this case is that in the *Krug* case the lieu selection rights being considered by this Court were lieu selection rights arising under the Acts of 1874 and 1904 rather than lieu selection rights under the Act of 1897.

In the *Krug* case this Court said in an unanimous decision: "We agree with the District Court. We think, as it held, that the Secretary of the Interior's construction of the 1940 Act was clearly right."

The Secretary of Interior's construction of the 1940 Act was as follows:

> "The exception in Sec. 321 b protects certain sales of lands to innocent purchasers for value. It does not protect a sale of mere rights of selection, at the most in the nature of floats, not attached to any tracts, and which may never be exercised, the filing of selection being presumably at the option of the purchaser. As no land was sold, these transactions do not come within the protection of this exception.
>
> "The theory back of the filing of selections 080809 and 080810 may be that the Railroad Company's selection rights under the acts of 1874 and 1890 were not in fact released. The releases, in conformity with the Transportation Act and the regulations, are broad and include all rights and claims pursuant to, growing out of, or arising from the grants except the three types of claims specifically excluded therefrom, above mentioned, relative to patented, clear-listed, and sold lands. All outstanding unused select rights under the acts of 1874 and 1890 were released and the selections 080809 and 080810 therefore are subject to rejection."

Cord and Wheeler in this litigation make the precise argument which the Santa Fe made in the *Krug* litigation. This argument was clearly and unequivocally rejected by this court in *Krug* with the following language:

> "The respondent argues the case here as though the 1940 Act only applied to claims for 'lands under any grant.' The language is not so narrow. It also required railroads to surender claims for '*compensation, or reimbursement* on account of lands or interests in lands which have been granted, claim to have been granted, or

which it is claimed should have been granted * * * under any grant.' (Italics supplied) This language in itself indicates a purpose of its draftsmen to utilize every term which could possibly be conceived to give the required release a scope so broad that it would put an end to future controversies, administrative difficulties, and claims growing out of land grants. Beyond a doubt the words 'compensation' and 'reimbursement' as ordinarily understood would describe a payment to railroads in money or in kind for the surrender of lands previously acquired by them 'under a grant.' If they do not have this meaning, their use in the Act would have been hardly more than surplusage. And when viewed in the context of the historical controversies and claims under the land grants, the conclusion that the 1940 Act covers claims such as respondent's seems inescapable.

"Here, as in the 1929 Act, which applied to the claims of only one railroad, we think Congress intended to bar any future claims by all accepting railroads which arose out of any or all of the land-grant acts, insofar as those claims arose from originally granted, indemnity or lieu lands. All the Acts here involved, the Acts of 1866, 1874, 1904 and 1940, relate to a continuous stream of interrelated transactions and controversies, all basically stemming from one thing — the land grants. We think Congress wrote finis to all these claims for all railroads which accepted the Act by executing releases."

The key sentence of the Arizona Court of Appeals opinion is as follows:

"Considering the purpose of the (Transportation) Act it only makes sense that any claims *(Petitioner's note: this would include Forest Lieu Selection Rights)* arising out of lands which had already been patented are also excepted from the meaning of the Act."

This is clearly contrary to this Court's express language and decision in *Krug* as well as the language of the Secretary of the Interior in his construction of the Act which construction was specifically endorsed by this Court in *Krug*.

As was made clear by this Court and by the Secretary of the Interior, what we were involved with in the *Krug* case were not the base lands, but the lieu selection rights. So, too, in this case we are concerned with whether or not lieu selection rights were destroyed. Whether the base lands, which in both the *Krug* case and this case were granted lands, had been reduced to patent is immaterial because the rights which were destroyed and for which Cord and Wheeler claimed and were awarded damages were lieu selection rights and not land. This is undisputed, evidenced by Cord's and Wheeler's own pleadings, by the trial court's findings of facts, conclusions of law and its judgment and by the measure of damages employed by the trial court, which was the value of the selection rights allegedly destroyed and not the value of any land.

3. The Decision of the Sole Issue in This Litigation Is Important to the Utilization of Public Lands and Important in Determining the Rights and Obligations of Parties, Including the United States, Under Statutes of the United States Relating to Rights Including Forest Lieu Selection Rights.

On August 5, 1955, Congress passed a statute (69 Stat. 534) requiring, among other things, that lieu selection rights, such as Forest Lieu Selection Rights, had to be recorded within two years from the effective date of that Act. Any rights not so recorded were not to be accepted thereafter by the Secretary of the Interior for recordation or as a basis for the acquisition of lands.

Under Public Law 88-545 (78 Stat. 751) which was passed on August 31, 1964, holders of claims, including Forest Lieu Selection Rights, recorded under the Act of August 5, 1955, could prior to July 1, 1966 apply for land and prior to January 1, 1970 apply for cash in satisfaction of their recorded claims.

Under the Act of August 31, 1964 the Secretary of the Interior is to convey selected lands or to arrange for cash payments only if the Secretary determines that the claims (i.e., the underlying rights such as Forest Lieu Selection Rights) are valid. Among the rights recorded under the Act of August 5, 1955 were Forest Lieu Selection Rights. Likewise, among the claims filed under the Act of August 31, 1964 were those based on Forest Lieu Selection Rights including Forest Lieu Selection Rights originally issued to Santa Fe Pacific Railroad Company.

If Petitioner is correct in its assertion that unexercised Forest Lieu Selection Rights originally issued to the Santa Fe were released pursuant to the Transportation Act of 1940 and the Release delivered pursuant to the Act, then the Secretary of the Interior should refuse to honor any of the claims made under the Act of August 31, 1964 which are based on such Forest Lieu Selection Rights. Accordingly, the United States has a clear interest in obtaining a final answer to the sole issue remaining in this litigation: whether the Release filed under the Transportation Act of 1940 terminated the Forest Lieu Selection Rights originally issued to the Santa Fe.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted. The decision of the Arizona Court of Appeals is in direct conflict with the decision of this Court in *Krug* and is of equal importance to this Court's decision in *Krug*.

Respectfully submited,

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(Appendices follow)

Appendix A

Supreme Court
State of Arizona
Phoenix
85007
June 9, 1971

No. 10500-PR
(Supreme Court)
No. 1 CA-CIV 1250
(Court of Appeals)
Nos. C-21046 and C-25579
(Yavapai County)

SANTA FE PACIFIC RAILROAD COMPANY, a corporation,
Appellant & Cross-Appellee,
vs.
E. L. CORD, DONALD R. WHEELER, as Trustee,
Appellees & Cross-Appellants.

The following action was taken by the Supreme Court of the State of Arizona on June 8, 1971 in regard to the above-entitled cause:

"ORDERED: Petition for Review—DENIED."

Record returned to the Court of Appeals, Division One, this 9th day of June, 1971.

CLIFFORD H. WARD, Clerk
By /s/ MARY ANN HOPKINS
Deputy Clerk

cc: John J. O'Connor, III, Esq., Suite 900, 411 N. Central Ave., Phoenix
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Clerk, Court of Appeals, Division One, Phoenix
Hon. Jack L. Ogg, Judge, Superior Court of Yavapai County, County Courthouse, Prescott 86301
West Publishing Co., 50 W. Kellogg Blvd., St. Paul, Minn. 55102

Appendix B

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE
Filed MAR 1 1971

1 CA-CIV 1250
Yavapai County
Superior Court
Cause Nos. C-21046 and C-25579

SANTA FE PACIFIC RAILROAD COMPANY, a corporation,
Appellant & Cross-Appellee,
vs.
E. L. CORD, DONALD R. WHEELER, as Trustee,
Appellees & Cross-Appellants.

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Attorneys for Appellees
Wheeler and Cord and Cross-Appellants

This cause was decided by the Judges of Division Two as authorized by A.R.S. Sec. 12-120(E).

The above-entitled matter was duly submitted to the Court. The Court has this day rendered its opinion.

IT IS ORDERED that the opinion be filed by the Clerk.

IT IS FURTHER ORDERED that a copy of this order together with a copy of the opinion be sent to each party appearing herein or the attorney for such party and to THE HONORABLE JACK L. OGG, Judge.

/s/ HERBERT F. KRUCKER
Herbert F. Krucker, Chief Judge.

The foregoing directives were complied with this 15th day of March, 1971, by mailing required to:

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The Honorable Jack L. Ogg, Judge
Yavapai County Superior Court
Yavapai County Courthouse
Prescott, Arizona 86301

CLASSIE GANTT, Clerk

By
/s/ PATSY A. PIERCE
Deputy Clerk

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

1-CA-CIV 1250

SANTA FE PACIFIC RAILROAD COMPANY, a corporation,
Appellant & Cross-Appellee,
vs.
E. L. CORD, DONALD R. WHEELER, as Trustee,
Appellees and Cross-Appellants.

Appeal from the Superior Court of Yavapai County
Cause Nos. C-21046 and C-25579
Honorable Jack L. Ogg, Judge

AFFIRMED

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H O W A R D, Judge.

This appeal involves two lawsuits which were consolidated in the trial court. The pleadings which set forth claims and defenses of all parties below were numerous and complex. The form in which the various claims were pre-

sented in the pleadings is not material and, therefore, no attempt will be made to detail the procedural manner in which the many questions involving this appeal first arose. Only three parties are involved in the appeal and the two cross-appeals. The sole appellant is the Santa Fe Railroad Company, hereinafter referred to as Santa Fe. The two appellees are E. L. Cord and Donald R. Wheeler, as Trustee, hereinafter referred to as Cord and Wheeler, or at times, jointly as claimants. The briefs filed by the appellant and appellees are excellent and have been of great benefit to the court.

Prior to discussion of the facts in this case, a brief historical background will be beneficial.

The first half of the 19th century, the United States, by means of various treaties, acquired a vast new area of sparsely populated land in the south and west. Assimilation of this new territory with the older part of the country became a national problem because of the lack of efficient means of transportation between the two areas. Transportation was first provided by means of wagons, stage coaches and waterways. This method of travel was slow, and a more rapid and extensive means of transportation was obviously necessary. The building of railroads largely provided the solution to the problem. The railroads made it possible for the opening of the frontier. In order to encourage a rapid railroad building program, Congress chose to make public grants of a large proportion of the new lands to underwrite and subsidize the participation of private individuals and privately owned companies in the program. After July 27, 1866 (14 Stat. 292) the Atlantic and Pacific Railroad Company was created, and was given a grant of every alternate section of public land not mineral, designated by odd numbers, to the amount of 20 sections per mile on each side of the railroad line as designated by plat filed in the office of

the Commissioner of the General Land Office. A total of 69 other railroads received comparable grants. In total, the public lands which were granted to the railroads were almost equal to the acreage of the New England states, New York and Pennsylvania combined.

The execution of the land-grant program was marked by innumerable complex and unforseen difficulties; its course has been beset by claims and counterclaims asserted by and between the settlers, railroads and government. Congress, the executive agencies, and the courts have been repeatedly called upon to resolve these conflicting claims. Finally, Congress passed Section 321 of the Transportation Act of 1940, 54 Stat. 954, 49 U.S.C.A. § 65. The provisions of this Act will be set forth later in this opinion.

Returning to the facts in this case, the land granted to the Atlantic and Pacific Railroad Company eventually passed to the Santa Fe by virtue of a foreclosure of a mortgage made by the Atlantic and Pacific Railroad Company and the provisions of the Act of March 3, 1897, 29 Stat. 622.

On April 2, 1902, Santa Fe, together with the Aztec Land and Cattle Company, Saginaw and Manistee Lumber Company, William F. Baker, E. B. Perrin and Robert Perrin entefed into a contract with the Secretary of the Interior by which they agreed to relinquish and deed their private and patented land holdings within the limits of the San Francisco Mountains Forest Reserve to the United States of America and to select other lands in lieu thereof, according to the provisions of the Act of Congress approved June 4, 1897, 30 Stat. 36, and the Act of Congress approved June 6, 1900, 31 Stat. 614. The Act of Congress approved June 4, 1897, 30 Stat. 36, provided in part:

> "That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included

within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent * * *"

Similar contracts to that referred to above were entered into by Santa Fe and the Secretary of the Interior covering the private and patented land holdings of Santa Fe in the Grand Canyon Forest Reserve on July 7, 1902.

On March 3, 1905, Congress repealed the 1897 Act as it related to Forest Lieu Selection Rights. 33 Stat. 1264. A savings clause, however, preserved the contract rights of Santa Fe and others based upon the aforesaid contracts with the Secretary of Interior. No time for the exercise of the Forest Lieu Selection Rights was specified in the 1905 Enactment of Congress.

Pursuant to the contracts of April 2, 1902 and July 7, 1902, referred to above, the Santa Fe during years 1902, 1904, 1909 and 1910, conveyed to the Government of the United States, parcels of real property involved in this action, all of which lands had been patented to Santa Fe by the Federal Government. In exchange therefor, the Santa Fe received the rights to select other government owned lands of a comparable acreage, pursuant to 30 Stat. 36, 31 Stat. 614, and the savings clause in 33 Stat. 1264.

Commencing in the year 1902 and continuing until the year 1917, Santa Fe sold all of its right, title and interest in various Forest Lieu Selection Rights, including all rights incident and appurtenant thereto, for a valuable consideration, to third parties. Pursuant to the plan and device adopted by Santa Fe for the purpose of selling said rights, they executed and delivered to various persons at the time of sale, a Deed of Relinquishment to the United States Government, an Abstract of Title, and a Power of

Attorney pertaining to the base lands involved in this case. This Power of Attorney authorized the attorney-in-fact to select lands in lieu of the relinquished base lands reconveyed to the Government of the United States. Such selections were to be made in the name of Santa Fe. Furthermore, an additional power of attorney was issued to authorize the attorney-in-fact to convey the lands selected in lieu of their relinquished base lands in the name of Santa Fe. In cases in which the second power of attorney, to convey the selected lands, was not executed and delivered at the time of sale, upon exercise of the power to select and the patenting of the lieu lands to the Santa Fe, Santa Fe would then quit claim the selected lands to the one making the selection, or execute and deliver at a later date to the holder of the power of attorney to select, the power of attorney to convey. The space for the name of the attorney-in-fact in all powers of attorney was left blank, and it was with the express purpose and intent of Santa Fe that the purchaser or any successor in interest of such purchaser to whom the power or powers of attorney might be sold, transferred or delivered, should have the right to fill their name in the blank and thereafter to act as attorney-in-fact under said powers for Santa Fe at any time they should elect. Concurrently with the original delivery of such power or powers, the base lands described in the powers of attorney were reconveyed by Santa Fe to the United States of America and the Deed recorded, or the base lands had prior thereto been reconveyed by Santa Fe to the United States of America, and the Deed recorded.

The first sales of the selection rights, as evidenced by the blank powers of attorney and other supporting documents, were made by Santa Fe primarily to dealers in such rights.

By the delivery of such blank powers, Santa Fe intended that such rights could be sold and transferred by mere delivery of the powers of attorney from one party to another without a formal written assignment or chain of title.

The purpose of Santa Fe in selling such Forest Lieu Selection Rights was to raise money for its business and operation. The sale of the powers of attorney and other supporting documents by Santa Fe was at the fair market value thereof and a valuable consideration was received by Santa Fe from the original purchasers.

The powers of attorney and other supporting documents were purchased or acquired by Cord and Wheeler for valuable consideration and at the time of such acquisition, the powers of attorney, insofar as the names of the attorneys-in-fact were concerned, were blank.

In 1955 to 1959, one Ernest O. Buhler and Mildred B. Buhler entered into a written agreement with the alleged heirs at law of the original purchasers of the powers of attorney sold by Santa Fe, wherein and whereby the Buhlers were to acquire back the base lands from the U. S. Government and share in the profits resulting from the reconveyance of such lands.

Ernest O. Buhler solicited and obtained the aid and cooperation of Santa Fe in obtaining the lands involved in this case back from the U.S. Government for the heirs of the original purchasers of the powers of attorney from Santa Fe and in 1955, 1956 and 1957, Santa Fe, at its own request, obtained quit claim deeds for the base lands from the U.S. Government without the knowledge or consent of Cord and Wheeler, the owners of the Forest Lieu Selection Rights pertaining to the base lands.

After Santa Fe received the base lands back from the United States of America by quit claim deed, it, prior to

April 1, 1955, conveyed a portion of these lands for which Cord and Wheeler had powers of attorney, to the heirs of the original purchasers of the powers of attorney for the Forest Lieu Selection Rights who had entered into contracts with Ernest O. Buhler. No further conveyances of the base lands were made by Santa Fe to the heirs of the original purchasers of the powers of attorney since the dispute arose between Ernest O. Buhler and Santa Fe as to who was entitled to the base lands.

To resolve this dispute between Santa Fe and Buhler, Santa Fe, on January 21, 1958, entered into the following plan with Ernest O. Buhler: As to any base lands received from the United States of America against which there was an adverse claim, the base lands would not be conveyed by Santa Fe to any persons or parties who had entered into agreements with Ernest O. Buhler. That as to such base lands, Ernest O. Buhler would obtain a quit claim deed from the heirs of the original purchasers of the powers of attorney from Santa Fe, and Ernest O. Buhler would occupy such base lands and pay taxes thereon for the statutory period, and thereafter Ernest O. Buhler would bring his quiet title of such adverse possession. In the event a holder of the powers of attorney sold by Santa Fe appeared and had a better claim for the base lands than the heirs of the original purchasers of the powers of attorney, Santa Fe would give them a deed to such base lands and let such holders of the powers of attorney to the lands take any action that might be necessary against Ernest O. Buhler. In the event no such claim was made to the base lands, Buhler would obtain title to the lands allegedly being held in trust by Santa Fe for the owners of the powers of attorney, and Buhler would become the owner of the base lands by court decree after occupancy adversely for five years and the payment of taxes due.

In October, 1958, Ernest O. Buhler died and his widow, Mildred B. Buhler, entered into the same agreement that her husband had made with Santa Fe.

Santa Fe paid no taxes on the base lands after they were quit claimed to if by the United States of America, taxes being paid instead by Ernest O. Buhler and Mildred B. Buhler.

Cord and Wheeler filed actions for damages against Santa Fe, alleging in substance, that pursuant to the Act of Congress on June 4, 1897 (30 Stat. 36), Santa Fe conveyed to the United States certain land to which it then had title and in exchange therefor Santa Fe received from the United States, rights to select lands owned by the United States; that Santa Fe sold certain of these selection rights to third persons; that Cord and Wheeler now own these rights; that in 1955, 1956 and 1957, at the request of Santa Fe, the lands which Santa Fe had conveyed to the government in exchange for the Forest Lieu Selection Rights which it had received and which claimants now own, were re-conveyed by the government to Santa Fe, and, as a result, Cord's and Wheeler's selection rights were destroyed, all to their damage.

In answer to these charges, Santa Fe asserted, in substance, that pursuant to the provisions of the Transportation Act of 1940, supra, Santa Fe had, in 1941, executed and delivered to the United States a release of all claims it had against the government for reimbursement on account of lands granted to it or its predecessor in interest to aid in the construction of a railroad and that this release, among other things, terminated any and all outstanding selection rights, including those allegedly owned by the claimants. Accordingly, Santa Fe alleged that the selection rights were destroyed in 1941 and that any claim against them for

destruction of said rights had long since been barred by the statute of limitations.

The case was tried to the court in two parts. The first trial was limited to the question of liability. After the trial on the issue of liability, the court indicated by an order for partial judgment, that the claimants had a claim against Santa Fe. Thereafter, there was a trial on the issue of damages. Subsequently, the court indicated its conclusions as to the amount of damages.

In due course the court entered written findings of fact and conclusions of law and a formal judgment. In its conclusions of law, the court, inter alia, stated that Santa Fe had breached its implied warranty that it would do nothing to destroy the selection rights owned by the claimants, and that Santa Fe had breached its contract with the holders of the selection rights when it took back the base lands for those rights and thereby destroyed the right to select other federal land in exchange therefor.

The court awarded judgment in favor of Cord in the amount of $200,000 for the loss of his selection rights to 1,000 acres, and a judgment in favor of Wheeler in the amount of $59,472 for loss of his selection rights to 297.36 acres.

Santa Fe presents the following questions for review: (1) Whether the Forest Lieu Selection Rights claimed by Cord and Wheeler were terminated by virtue of the release executed and delivered by Santa Fe to the Secretary of the Interior and accepted by him on March 1, 1941, pursuant to the Transportation Act of 1940? (2) Whether the claimants are barred from asserting their claim by virtue of their delay and delay of their predecessors in interest in exercising the selection rights they claimed? (3) Whether the claimants have established they are the two owners of the

powers they claim? (4) Whether the damages awarded claimants are supported by the evidence or whether they exceed the amount of damages supported by substantial, reasonable and competent evidence?

THE FOREST LIEU SELECTION RIGHTS AND THE RELEASE OF 1941

Cord's and Wheeler's basis for their claims for relief is that Santa Fe destroyed their Forest Lieu Selection Rights in 1955, 1956 and 1957 when it asked for and received quit claim deeds from the United States to the base lands in exchange for those rights. Relying on the case of Krug v. Santa Fe Pacific Railroad Co., 329 U.S. 591, 67 S.Ct. 540, 91 L.d 527 (1947), Santa Fe claims that the Transportation Act of 1940 and the release it executed in compliance therewith to the Secretary of the Interior terminated the Forest Lieu Selection Rights and that since the rights were destroyed in 1941, they were not in existence in 1955, 1956 and 1957 aml are barred by the statute of limitations. We do not agree.

§ 321(b) of the Transportation Act of 1940, 54 Stat. 954, 49 U.S.C.A. § 65, provides that:

> "If any carrier by railroad . . . or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to [reduced rate] compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed him, a release of any claim it may have against the United States to lands, interest in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted,

or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law."

In the case of Krug v. Santa Fe Pacific Railroad Co., supra, the court pointed out that one substantial field of railroad-government controversy had been the terms of the original land-grant acts which required the railroads to carry government goods and personnel free of tolls. By reason of judicial interpretation of these terms, supplemented by periodic legislation, land-grant railroads for more than half a century immediately prior to 1940, transported for the government at one-half of the standard commercial rates.

During the depression years begining in the late 1920's and immediately following, railroad earnings declined considerably, and a movement began to relieve the roads of their land-grant obligations. Studies by some government-selected agencies recommended legislation for the outright repeal of the provisions for rate concessions to the government. Bills to accomplish this during the 75th and 76th Congress failed to pass but § 321 of the Transportation Act of

1940 provided that land-grant roads could by compliance with specified conditions, collect from the government full commercial rates, except for the transportation of military and naval freight and personnel. Briefly, it required that a railroad, to qualify for full rates, must execute within a year after the passage of the Act, a release of any claim it might have ". . . against the United States to lands, interest in lands, compensation, or reimbursements on account of lands or interest in lands, which have been granted, claimed to have been granted, or which it is claimed should have been granted such carrier or any predecessor in interest under any grant to such carrier or to predecessor in interest as aforesaid."

In addition to the Acts of Congress that we have previously mentioned, there should also be mentioned the Acts of 1874 and 1904, 18 Stat. 194; 33 Stat. 556. These Acts largely represent a congressional effort to settle conflicts among railroads, Government, and settlers, which arose by reason of settlement by homesteaders on railroad-granted lands after the grants had been made. Both Acts provided that where settlers had so occupied railroad-granted lands, the railroad could, on relinquishment of its title to them, select other lands in lieu of them.

A reading of the case of Krug v. Santa Fe Pacific Railroad Co., supra, convinces us that Santa Fe's reliance on this case is misplaced. In the *Krug* case Santa Fe contended that it had so-called lieu land claims against the Government which it claimed were not extinguished by § 321 of the Transportation Act of 1940. These claims rested on contractual exchanges of land made by Santa Fe under the Acts of 1874 and 1904. 18 Stat. 194; 33 Stat. 556. In the *Krug* case Santa Fe had filed suit to require the Secretary of the Interior to pass upon its application for these lands allegedly

due, but the district court dismissed the complaint holding that § 321 of the Transportation Act of 1940 and the release that Santa Fe gave thereunder barred the claims. In ruling against Santa Fe the court held that the 1940 Act not only applied to claims for "lands under any grant" but held that: "It also required railroads to surrender claims for '*compensation, or reimbursement* on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted * * * under any grant.'"

In describing the language and purpose of the Act the court held:

> "This language in itself indicates a purpose of its draftsmen to utilize every term which could possibly be conceived to give the required release a scope so broad that it would put an end to future controversies, administrative difficulties, and claims growing out of *land grants*. Beyond a doubt the words 'compensation' and 'reimbursement' as ordinarily understood would describe a payment to railroads in money or in kind for the surrender of lands previously acquired by them '*under a grant*' [citation] if they do not have this meantheir use in the Act would have been hardly more than surplusage. And when viewed in the context of the historical controversies and claims under the land grants, the conclusion that the 1940 Act covers claims such a respondent's seems inescapable." (Emphasis added)

It is quite clear to us the *Krug* case stands for the proposition that the purpose of § 321 of the Transportation Act of 1940 and the release given thereunder was to settle once and for all any inchoate rights which the railroad might have had against the United States Government growing out of the land-grants. Santa Fe strays from the holding and meaning of the *Krug* case when it fails to properly define

terms "grant" or "land-grant." The term "grant" is not to be equated with "patent." Santa Fe's predecessor, the Atlantic and Pacific Railroad Company was given its grant of every alternate section of public land, not mineral, designated by odd numbers by the Act of July 27, 1866, 14 Stat. 292. The creation of the grant in 1866 was just one step towards the securing of a patent. Only when the line was in and a survey made would the location of the land "granted" be ascertained. The *Krug* case recognized that the Transportation Act of 1940 attempted to settle once and for all any and all unperfected rights the railroads might have had because of the grants. § 321 of the Transportation Act of 1940 has nothing whatsoever to do with lands such as the base lands in this case to which the railroads had already secured a patent. In fact, § 321(b) of the Transportation Act of 1940 specifically excepts patented lands from the operation of the release. Considering the purpose of the Act, it only makes common sense that any claims arising out of lands which had already been patented are also excepted from the meaning of the Act. As soon as the railroad receives its patent from the government, the land no longer is "grant-land" but it is land patented to the railroad and is owned by it as is the land of any other citizen in the country.

The claim which Cord and Wheeler had under the Act of June 4, 1897, 30 Stat. 36, is a claim separate and apart from any claims under the Transportation Act of 1940. The purpose of the Act of June 4, 1897, 30 Stat. 36, is well set forth in Udal v. Battle Mountain Company, 385 F.2d 90 (9th Cir. 1967). On June 4, 1897, Congress passed this Act providing that where lands in private ownership or lands subject to bona fide claim lay within the limits of a forest reservation, the settler or owner might relinquish the tract to the Government and select in lieu thereof a tract of vacant public land of equivalent area. We note that this Act pertained to rail-

roads and private individuals alike, where as the Transportation Act of 1940 was dealing only with railroads *as a railroad.*

To bolster its argument, Santa Fe has cited to us extracts from decisions of the General Land Office and extracts from the office of the Secretary of the Interior involving the § 321(b) of the Transportation Act of 1940. Suffice it to say that none of these decisions concern Forest Lieu Selection Rights under the Act of June 4, 1897, 30 Stat. 36, and are therefore inapposite as is the case of Santa Fe Pacific Railroad v. Ickes, 57 F.Supp. 984 (1944), also cited by Santa Fe. If the Forest Lieu Selection Rights had been destroyed by the release given by Santa Fe pursuant to the Transportation Act of 1940, we find it difficult to believe that the United States Government would not plead the release in a claim by an owner of these rights against the Secretary of the Interior. We are referring in particular to the case of Udall v. Battle Mountain Company, supra. In that case Battle Mountain Company was the assignee of Forest Lieu Selection Rights. The case involved a direct action by the assignee against the United States. We first note in this case that the 9th Circuit Court of Appeals, although holding that the assignee did not have a direct cause of action against the Secretary of the Interior, did say in a footnote at page 94:

> ". . . Nothing we say here reflects on the right of Battle Mountain to sue Santa Fe on the powers of attorney it executed in 1915."[1]

1. In 1955, Congress passed the Recording Act of 1955, 69 Stat. 534, 43 U.S.C.A. § 274 Note. In 1955, concerned about the extent of floating scrip and dormant land claims and desirous of knowing the extent of the government's unfulfilled obligations respecting public lands, Congress passed an Act requiring recordation of all such claims, including claims to Forest Lieu Selection Rights. It was provided that if such claims were not recorded within a two year period, they would not be accepted as a basis for the acquisition of land.

DELAY IN EXERCISING SELECTION RIGHTS

Santa Fe contends it was clear that time was of the essence under governmental regulations and the contracts with the Secretary of the Interior. It alleges that the railroad was obligated under the 1902 regulations to file selections "within a reasonable time" after the recording of the base land relinquishments. Introduced in evidence was a letter dated March 28, 1902 to the Secretary of the Interior by Santa Fe which stated in part:

> "* * * we pledge ourselves to *immediately* begin the relinquishing of our private holdings within the limits of said reservation, and the selection of other lands in lieu thereof * * *. And we agree *to use all reasonable diligence* in prosecuting the work of relinquishment and selection to a final conclusion *at the earliest reasonable time*." (Emphasis added)

In the letter dated June 13, 1902 to the Secretary of the Interior, Santa Fe stated:

> "It is further understood that the Department will, in every reasonable way, so *expedite* all necessary surveys and approval thereof, and the issuance of patents to the railroad company, *as to enable said company to promptly carry out this understanding*." (Emphasis added)

The railroad's proposals were approved by the Secretary of the Interior who wrote the following to the Commissioner of the General Land Office:

> "The proposal of the railroad company in the two letters of Messrs. Britton and Gray [attorneys for the railroad meets with my approval, and your office will *promptly* enter upon the work of *issuing patents* to the

alternate odd-numbered sections named, where the railroad company is entitled thereto, *and otherwise take such steps* as may be necessary to effect the exchange named *in the manner prescribed in this correspondence and also in conformity to the statute and regulations.*" (Emphasis added)

Thus, Santa Fe contends that since Cord and Wheeler stepped into its shoes, it appears to be self-evident that a period of fifty-odd years is more than the reasonable time and diligence required by the regulations and by the contracts between the railroad and the United States for consummation of the exchanges. This being so, the holders of any powers of attorney have lost and forfeited their rights to enforce any selection rights. We do not agree.

On March 3, 1905, Congress repealed the 1897 Act so far as the related Forest Lieu Selection Rights, 33 Stat. 1264, but a saving clause preserved the rights of Santa Fe and others based upon their contracts with the Secretary of the Interior. No time for the exercise of the Forest Lieu Selection Rights was specified in the said 1905 enactment of Congress. The Act further provided that "But the validity of contracts entered into by the Secretary of the Interior prior to the passage of this Act shall not be impaired." In the case of John A. Eddy, decided April 8, 1919, 47 L.D. 109, by the Department of the Interior, it was held concerning Forest Lieu Selection Rights:

> "The proviso to the Act of March 3, 1905, authorizing the making of a new Forest Lieu Selection, provides no specific period within which its benefits may be claimed, and any attempt to limit the rights of reselection to a certain time is an abridgement of the selector's rights and without authority of law."

The regulations implementing the 1905 Act are found in 33 L.D. 558; May 16, 1905 and state in part:

> "* * * Congress referred to, recognized and authorized consummation of certain agreements entered into between the Secretary of the Interior and the owners of certain odd numbered sections of land in the San Francisco Mountains and the Grand Canyon forest reserves * * *. Under this provision selections are still authorized to be made in satisfaction of * * * odd numbered sections within the San Francisco Mountain forest reserve * * * [and] the Grand Canyon forest reserve, Arizona, relinquished or to be relinquished to the United States by the Santa Fe Pacific Railroad Company * * *. Upon the presentation of such relinquishments, with applications to select lands in lieu thereof, in accordance with instructions of July 7, 1902 (31 L.D. 372), you will accept same if otherwise unobjectionable."

The "Instructions of July 7, 1902 (31 L.D. 372)" in accordance with which relinquishments and selections under the contract's exceptions were thus required to be presented provides in ¶ 11:

> "Selections should be filed *within a reasonable time* after the relinquishment or reconveyance has been recorded in the manner indicated." (Emphasis added)

In 1938 under the Federal Register Law (44 U.S.C.A. 311) the regulations of the Department of the Interior were codified. However, the regulations under the Acts of June 4, 1897 and June 6, 1900, approved July 7, 1902 (31 L.D. 372) and regulations under the Act of March 3, 1905, approved May 16, 1905 (33 L.D. 558), were not codified in 1938 and therefore have no force and effect today or anytime after 1938 insofar as affecting any of the rights of Cord and Wheeler. Santa Fe's argument is further militated against

by the Recording Act of 1955, supra, which clearly shows that Congress still considered the Forest Lieu Selection Rights as being in full force and effect even though they had not been exercised.

Moreover, the outstanding rights were recognized by Congress by the Scrip Act of August 31, 1964, 78 Stat. 751, 43 U.S.C.A. 274. Under the 1964 Act, the parties who had registered their claims under the Recording Act of August 5, 1955, supra, could select lands of their own choosing without any value criteria until June of 1966.

HAVE CLAIMANTS ESTABLISHED THEY ARE THE TRUE OWNERS OF THE POWERS THEY CLAIM?

Santa Fe claims that Cord and Wheeler have failed to prove they are the true owners of the powers to select and powers to convey. Cord and Wheeler obtained the powers in 1951. In particular, Santa Fe asserts that "There is no evidence whatsoever of transfers from the original parties to whom the subject powers were issued. There is no evidence as to whether there were two or ten intervening transfers. There is no evidence as to whether any transfer between said intervening owners resulted from theft, transfer contrary to the provisions of any applicable probate code, etc."

The trial court in its conclusions of law number 4 stated:

> "* * * That the Forest Lieu Selection Rights as sold by Santa Fe were assignable and transferable by the holders and owners of the powers of attorney to select and convey, by mere delivery thereof, without a formal written assignment or chain of title from the original purchasers thereof. Further, Santa Fe by selling the powers of attorney in the form which it did to the original purchasers is estopped to contend that the present holders and owners of the said powers of attorney

> must show or prove a complete chain of title from the original purchasers of the powers to the present holders and owners thereof."

Santa Fe cites to this court the case of Smith v. Rowe, 3 Wash.2d 320, 100 P.2d 401 (1940), as being a case on all fours with its position and the facts of this case. We do not agree. In Smith v. Rowe, supra, there was a purported assignment in blank by a corporation of its accounts receivable. The plaintiff in that case was the purported assignee who was attempting to enforce the assignment against a debtor. The court held that this was no proof that the original assignment had been made and that the possession of a chose in action does not raise a presumption of an assignment to such holder.

The case *sub judice* differs from Smith v. Rowe, supra, in that here the action is between the original "assignor" and an "assignee." There is no question in this case that Santa Fe executed powers to select and powers to convey in blank and for value. Indeed, the trial court found as a fact, that "The blank for the name of the attorney-in-fact in all powers of attorney was left blank, and it was the express purpose and intent of Santa Fe that the purchaser or any successor in interest of such purchaser to whom the power or powers of attorney might be sold, transferred or delivered should have the right to fill their name in the blank as the attorney-in-fact and thereafter to act as attorney-in-fact under said power to powers of attorney for Santa Fe, at anytime they should elect."

This finding of fact has not been disputed by Santa Fe. The form Santa Fe chose to sell these powers clearly indicates that it anticipated subsequent transfers by the original purchasers. After 50 years of such transfers and having chosen this particular form of transfer, Santa Fe is

estopped from requiring the claimants to prove a chain of assignment. Cf. Holmes v. Graves, 83 Ariz. 174, 318 P.2d 354 (1957); City of Tucson v. Koerber, 82 Ariz. 347, 313 P.2d 411 (1957); Unruh v. Industrial Commission, 81 Ariz. 118, 301 P.2d 1029 (1956).

ARE THE DAMAGES AWARDED CLAIMANTS SUPPORTED BY THE EVIDENCE?

Santa Fe claims that there was no competent evidence to support the findings by the court that the Forest Lieu Selection Rights claimed by Cord and Wheeler were worth $200 per acre. The evidence at the trial established that on June 16, 1956, Wheeler purchased 160 acres of Forest Lieu Selection Rights for $50 an acre. He later made subsequent purchases of Forest Lieu Selection Rights for $50 per acre, giving the person from whom he purchased the rights a right to repurchase for $75 per acre. Wheeler was questioned by his attorney as to his opinion of the value of the Forest Lieu Selection Rights. He testified that he thought that they were worth between $200 and $300 per acre. On voir dire examination by the attorney for Santa Fe it was brought out that Wheeler's testimony was based upon what some other people had told him. This, however, does not destroy the admissibility of Wheeler's testimony. It is well established law that an owner of property is always competent to testify as to its value and that any explanation of how he arrived at that value merely goes to the weight of his evidence. Board of Regents of the University and State Colleges v. Cannon, 86 Ariz. 176, 342 P.2d 207 (1959).

As to the claim of Cord, the evidence shows that he paid in 1949 as much as $137 per acre for Forest Lieu Selection Rights. The court had the benefit of Wheeler's testimony

as to his opinion of the value of his Forest Lieu Selection Rights. Although normally the opinion of one owner of property as to the value of his property does not prove the value of another person's property, we believe that this case presents an exception. Both Cord and Wheeler held exactly the same property. They both held the right to make a selection from government lands, acreage of the total amount of the base lands from which the lieu rights derived. These rights do not attach to any specific lieu lands prior to selection but rather give the holder the right to select from those lands which the government tells the owner may be available for selection. It would have been wholly unjust for the court in this case to have awarded Wheeler $200 an acre for his lieu rights and Cord $137 an acre or a lesser amount for his rights when they both held the identical property. For these reasons we do not believe the court erred in awarding both Cord and Wheeler damages based on $200 per acre.

We can also at this time dispose of the cross-appeal of Cord and Wheeler. They claim that under the Scrip Act of August 31, 1964 (43 U.S.C.A. 274) and regulations issued by the Secretary of the Interior pursuant to said Act, 43 C.F.R. 2221.01 to 2221.2-4, on or after July 1, 1966, holders of Forest Lieu Selection Rights recorded with the Secretary of the Interior by the year 1957 could have applied to the said Secretary and received the sum of $275 per acre in satisfaction of their claims. Cord and Wheeler therefore claim that the court should have awarded them damages in the sum of $275 per acre and not $200 per acre.

We do not agree with this contention. The value of the rights destroyed by Santa Fe must be valued as of the date the base lands were reconveyed by Santa Fe to the United States Government, to-wit, the years 1955 and 1956.

As of that date, the Scrip Act of August 31, 1964 was not in existence, and the claimants are not entitled to recover based upon the acreage value set forth in that Act.

Cord and Wheeler also contend in their cross-appeal that they are entitled to punitive damages. Claimants contend that their cause of action is for conversion in tort. Santa Fe contends that it is a breach of contract action and that no punitive damages can be awarded for breach of contract.

Assuming arguendo that this is a tort action, our review of the evidence in this case does not indicate that punitive damages can be recovered unless the evidence clearly shows that the wrongdoer's action was wanton, malicious and oppressive or gross and outrageous. Iagar v. Metcalf, 11 Ariz. 283, 94 P. 1094 (1908). Punitive damages are applicable where there is a reckless indifference to the interest of others. Nielson v. Flashberg, 101 Ariz. 335, 419 P.2d 514 (1966). The trial judge did not in his findings note such conduct on the part of Santa Fe. We do not disturb the findings of fact of the trial judge unless they are clearly erroneous, and will not disturb them in this case.

Affirmed.

LAWRENCE HOWARD, Judge.

CONCURRING:

HERBERT F. KRUCKER, Chief Judge.

JAMES D. HATHAWAY, Judge.

NOTE: This cause was decided by the Judges of Division Two as authorized by A.R.S. § 12-120(E).

Appendix C

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

Filed Apr. 15, 1971

1 CA-CIV 1250
Yavapai County
Superior Court

Cause Nos. C-21046 and C-25579

SANTA FE PACIFIC RAILROAD COMPANY, a corporation,
Appellant and Cross-Appellee,
vs.
E. L. CORD, DONALD R. WHEELER, as Trustee,
Appellees and Cross-Appellants.

ORDER

IT IS ORDERED that the cross-appellants' and Santa Fe's motions for rehearing be, and the same hereby are, denied.

IT IS FURTHER ORDERED that the second sentence of the first full paragraph on page 19 of the opinion be amended to read as follows:

> The value of the rights destroyed by Santa Fe must be valued as of the date the base lands were reconveyed to Santa Fe by the United States Government, to wit: the years 1955 and 1956.

Dated: April 14, 1971.

/s/ HERBERT F. KRUCKER
Herbert F. Krucker, Chief Judge
/s/ JAMES D. HATHAWAY
James D. Hathaway, Judge
/s/ LAWRENCE HOWARD
Lawrence Howard, Judge

A true copy of the foregoing order was mailed this 15th day of April, 1971, to:

A true copy of the foregoing
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Deputy Clerk

Appendix D

In the Superior Court of the State of Arizona in and for the County of Yavapai

CONSOLIDATED

Phoenix Title & Trust Company, as Trustee, and Daniel T. Norton and Jacqueline T. Norton, his wife, *Plaintiffs,* vs. First National Bank in Albuquerque, et al., *Defendants.*	No. 21046
Donald R. Wheeler, Trustee, et al., *Plaintiffs,* vs. Santa Fe Pacific Railroad Company, et al., *Defendants.*	No. 25579

(Title of Action)
(FILED: March 20, 1969)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial on January 16, 1968, at a consolidation of Cause No. 104117 originally filed in the Maricopa County Superior Court and transferred to the Yavapai County Superior Court as Cause No. 25579 and consolidated with Cause No. 21046, in the above entitled court, the court sitting without a jury, a jury having been expressly waived. T. W. Shumway, Esq.,

appeared as attorney for Plaintiffs and Counterdefendant Phoenix Title and Trust Company (Transamerica Title & Insurance Company) as Trustee, Daniel F. Norton, and Jacqueline T. Norton; John O'Connor III, Esq., appearing as attorney for the Defendant, Counterclaimant in Interpleader and Counterdefendant Santa Fe Pacific Railroad Company; Thomas J. Trimble, Esq., and Edward D. Neuhoff, Esq., appearing for Counterdefendant and Counterclaimant E. L. Cord; and Thomas J. Trimble, Esq., appearing for the Defendant and Counterclaimant Donald R. Wheeler, Trustee; and Blake Willis, Esq., appearing for the Defendants and Counterclaimants First National Bank in Albuquerque, et al., as set forth and named in their counterclaim.

The trial of this action was divided into two parts, that is, first the question of liability, and then the issue of damages, if the Court found on the liability issue against Santa Fe Pacific Railroad Company.

The Court having heard the oral evidence and having examined the documentary evidence introduced by the parties on the issue of liability, entered an order for partial judgment on June 21, 1968.

That thereafter on September 10, 1968, the Court heard evidence relative to the issue of damages. At this hearing, the Court was notified that all claims of the Plaintiffs and Counterdefendants Phoenix Title and Trust Company, as Trustee, Daniel F. Norton, and Jacqueline T. Norton, had been settled with the Santa Fe Pacific Railroad Company.

On this date the following appearances were made: John O'Connor III, Esq., appearing as attorney for the Defendant, Counterclaimant in Interpleader and Counterdefendant Santa Fe Pacific Railroad Company; Thomas J. Trimble, Esq., and Edward D. Neuhoff, Esq., appearing

for Counterdefendant and Counterclaimant E. L. Cord; Thomas J. Trimble, Esq., appearing for Counterdefendant and Counterclaimant Donald R. Wheeler, Trustee; and John M. Favour, Esq., appearing on behalf of Counterdefendant and Counterclaimant Richard M. Lade.

The Court now, after hearing all oral evidence and having examined all documentary evidence introduced by the parties on all issues in this case, hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. DONALD R. WHEELER is the Trustee for Roger S. Wheeler, Stuart G. Wheeler, Estate of Earle J. Jones, deceased, Richard F. Latimer, Owen H. Lewis and Donald R. Wheeler, and said party will hereinafter be referred to as "Wheeler".

2. Counterdefendant and counterclaimant E. L. Cord is a resident of the City of Reno, State of Nevada, and said party will hereinafter be referred to as "Cord."

3. Counterdefendant and counterclaimant Richard M. Lade is a resident of the State of California, and said party will hereinafter be referred to as "Lade."

4. Defendant, Counterclaimant, and Counterdefendant Santa Fe Pacific Railroad Company is a corporation, organized and existing under and by virtue of the laws of the United States of America, and duly qualified to do and doing business within the State of Arizona. Said party will be hereinafter referred to as "Santa Fe."

5. The Atlantic and Pacific Railroad Company was created by the Act of July 27, 1866 (14 Stat. 292) and was given a grant of every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty sections per mile on each side of the railroad line as

designated by a plat filed in the office of the Commissioner of the General Land Office.

6. The Atchison, Topeka and Santa Fe Railway Company is a carrier by railroad, furnishing transportation as defined in the Transportation Act of 1940 (49 U.S.C.A. 65 (a) and Santa Fe is a wholly owned subsidiary of The Atchison, Topeka and Santa Fe Railway Company and is a successor in interest of The Atlantic and Pacific Railroad Company, which received a grant of lands from the United States of America to aid in the construction of a part of the railroad operated by it.

7. The land so granted to the Atlantic and Pacific Railroad Company passed to Santa Fe by virtue of the foreclosure of a mortgage made by the Atlantic and Pacific Railroad Company and the provisions of the Act of March 3, 1897 (29 Stat. 622).

8. On April 2, 1902, Santa Fe together with the Aztec Land and Cattle Company, Saginaw & Manistee Lumber Company, Wm. F. Baker, E. B. Perrin and Robert Perrin entered into a contract with the Secretary of the Interior by which they agreed to relinquish and deed their private land holdings within the limits of the San Francisco Mountains Forest Reserve, to the United States of America, and to select other lands in lieu thereof, according to the provisions of the Act of Congress approved June 4, 1897 (30 Stat. 36) and the Act of Congress approved June 6, 1900 (31 Stat. 614).

A similar contract to that referred to above was entered into by Santa Fe and the Secretary of the Interior, covering the private land holdings of Santa Fe in the Grand Canyon Forest Reserve on July 7, 1902.

9. On March 3, 1905, Congress repealed the 1897 Act so far as it related to Forest Lieu Selection rights (33 Stat.

1264), but a saving clause preserved the contract rights of Santa Fe and others based upon their contracts with the Secretary of Interior. No time for the exercise of the Forest Lieu Selection Rights was specified in the said 1905 enactment of Congress.

10. Pursuant to the contracts referred to in Paragraph (8) above, Santa Fe during the years 1902, 1904, 1909 and 1910, conveyed to the Government of the United States all of the parcels of real property involved in this action, all of which lands had been patented to Santa Fe by the Government of the United States not later than 1906, and that in exchange therefor Santa Fe received from the United States Government the rights to select other Government owned lands of a comparable acreage.

11. That commencing in the year 1902 and continuing until the year 1917, Santa Fe sold all of its rights, title, and interest in various Forest Lieu Selection Rights, including all rights incident and appurtenant thereto, for a valuable consideration, to third parties, and pursuant to the plan, scheme and device adopted by Santa Fe for the purpose of selling said rights, Santa Fe executed and delivered to various persons at the time of sale, a deed of Relinquishment to the United States Government, an abstract of title, and a power of attorney pertaining to the base lands involved in this case, which power of attorney authorized the attorney-in-fact to select lands in lieu of the aforesaid relinquished base lands reconveyed to the Government of the United States and such selections were to be made in the name of Santa Fe; and, in addition, an additional power of attorney was also issued which authorized the attorney-in-fact to convey the lands selected in lieu of the relinquished base lands in the name of Santa Fe. In cases in which the second power of attorney to convey the selected lands was not executed and delivered at the time of

sale, upon the exercise of the power to select and the patenting of the lieu lands to Santa Fe, Santa Fe would then quitclaim the selected lands to the one making the selection, or execute and deliver at a later date to the holder of the power of attorney to select, a power of attorney to convey. The blank for the name of the attorney-in-fact in all powers of attorney was left blank, and it was the express purpose and intent of Santa Fe that the purchaser or any successor in interest of such purchaser to whom the power or powers of attorney might be sold, transferred or delivered should have the right to fill their name in the blank as the attorney-in-fact and thereafter to act as attorney-in-fact under said power or powers of attorney for Santa Fe, at anytime they should elect. Concurrently with the original delivery of such power or powers of attorney, the base lands described in the powers of attorney were reconveyed by Santa Fe by deed to the United States of America and the deed recorded, or the base lands had been prior thereto reconveyed by Santa Fe to the United States of America, and the deed recorded.

12. The first sales of the selection rights as evidenced by the said blank powers of attorney and other supporting documents were made by Santa Fe primarily to dealers in such rights, and by the delivery of such blank powers, Santa Fe intended that such rights could be sold and transferred by mere delivery of said powers of attorney, from one party to another without a formal written assignment, or chain of title.

13. The purpose of Santa Fe in selling such Forest Lieu Selection Rights as evidenced by the said powers of attorney was a means by which Santa Fe was able to raise money for its business and operations.

14. The sale of the said powers of attorney and other supporting documents by Santa Fe was at the fair market

value thereof, and a valuable consideration was received therefor by Santa Fe from the original purchasers.

15. When the powers of attorney and other supporting documents were purchased or acquired, the powers of attorney insofar as the name of the attorney-in-fact was concerned were in blank.

16. In 1955, 1956 and 1957, the Santa Fe Pacific Railroad Company obtained quitclaim deeds for the base lands from the United States Government without the knowledge or consent of the owners of the selection rights, thereby destroying the use of said rights to obtain other available federal land in exchange.

17. On or about July 21, 1958, the FIRST NATIONAL BANK IN ALBUQUERQUE received deeds to the following described property situated in Coconino County, State of Arizona:

> The North half of Section 27, Township 22 North, Range 9 East of the Gila and Salt River Base and Meridian,

from AGNES S. de LAMBERT and RICHARD de LAMBERT, who purported to be the beneficial owners thereof, and such deeds were recorded in the office of the County Recorder of said County.

18. On or about February 1, 1959, a lease was entered into between the FIRST NATIONAL BANK IN ALBUQUERQUE and U. S. CRISP wherein the above described land was leased by the bank for grazing purposes. Such lease was subsequently renewed so as to be in force for a continuous period in excess of five years from February, 1959.

19. U. S. CRISP, as Lessee, did at various times during the period of said lease and its renewals, graze cattle on the above described real property which was bounded on two sides by fencing adequate to contain cattle.

20. Real property taxes on the above described property were paid each year from 1958 until 1967 by the FIRST NATIONAL BANK IN ALBUQUERQUE or the beneficiaries for whom it holds equitable interest.

21. The possession of the FIRST NATIONAL BANK IN ALBUQUERQUE of the said land was peaceable and was not interrupted by any person or persons for a period in excess of five years. Such possession was adverse to and inconsistent with the ownership of said lands by any other person or persons.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties, and the subject matter.

2. The Forest Lieu Selection Rights as evidenced by the powers of attorney to select and convey and supporting documents pertaining thereto, are personal property.

3. Santa Fe sold and transferred all of its right, title and interest in and to the Forest Lieu Selection Rights, including all rights incident and appurtenant thereto, and the right to rescind the exchange with the United States Government, when it originally sold for a good and valuable consideration its package of documents containing in most instances the original recorded Deed of Relinquishment to the United States Government; Abstract of Title, blank Power of Attorney to Select and a blank Power of Attorney to Convey Lieu Lands, and equitable title in and to the said selection rights, and all rights incident or appurtenant thereto were vested by Santa Fe in the original purchasers of the powers of attorney to select and convey, and their assignees or successors, and the owners and holders of the powers of attorney to select and convey.

4. That the Forest Lieu Selection Rights as sold by Santa Fe were assignable and transferable by the holders

and owners of the powers of attorney to select and convey, by mere delivery thereof, without a formal written assignment or chain of title from the original purchasers thereof to the present owners and holders thereof. Further, Santa Fe by selling the powers of attorney in the form which it did to the original purchasers is estopped to contend that the present holders and owners of the said powers of attorney must show or prove a complete chain of title from the original purchasers of the powers to the present holders and owners thereof.

5. The Forest Lieu Selection Rights as evidenced by the powers of attorney to select and convey, and any supporting documents, constituted a binding and enforceable contract of sale between Santa Fe and the holders and owners of such Forest Lieu Selection Rights, and their successors or assignees.

6. Cord, Wheeler and Lade purchased or acquired as bona fide purchasers for value all of their respective Forest Lieu Selection Rights.

7. At the time Santa Fe sold the Forest Lieu Selection Rights on the open market, it impliedly warranted that it would not do anything to impair, destroy or diminish the selection rights.

8. Santa Fe breached the contract with the holders of the Forest Lieu Selection Rights when it took back the base lands and destroyed the right to select other Federal land in exchange.

9. The holders of the Forest Lieu Selection Rights acquired no legal interest in the base lands.

[The following paragraph was inserted by the Court of Yavapai County.]

Conclusion No. 9 vacated and substituted with following Conclusion by Court Order June 19, 1969.

9. The holders of the Forest Lieu Selection Rights acquired and [sic] equitable interest in the base lands but acquired no legal interest of record in the base lands.

10. The alleged heirs or devisees of the original purchasers of the Forest Lieu Selection Rights are entitled to no relief against any party to this action.

11. The First National Bank In Albuquerque, as Trustee, has legal title by reason of adverse possession to the following described property: Parcel 1 "The NE ¼ of Section 27, Township 22 N, Range 9 E of the Gila and Salt River Base and Meridian, Coconino County, Arizona." Parcel 2 "The NW ¼ of Section 27, Township 22 N, Range 3 E of the Gila and Salt River Base and Meridian, Coconino County, Arizona."

12. Santa Fe holds the legal title to all remaining reconveyed base lands free and clear from any and all claims made by the parties to this action with the exception of the land set out in Paragraph 11 above.

13. E. L. Cord was the owner of Forest Lieu Selection Rights to 1000 acres and is entiled to recover damages in the sum of $200,000.00 from Santa Fe for the loss of said rights.

14. Donald R. Wheeler was the owner of Forest Lieu Selection Rights to 297.36 acres and is entitled to recover damages in the sum of $59,472.00 from Santa Fe for the loss of said rights.

15. Richard M. Lade was the owner of Forest Lieu Selection Rights to 160 acres and is entitled to recover damages in the sum of $32,000.00 from Santa Fe for the loss of said rights.

DATED this 20th day of March, 1969.

/s/ Jack L. Ogg
Judge of the Superior Court

In the Superior Court of the State of Arizona
in and for the County of Yavapai

CONSOLIDATED

Phoenix Title & Trust Company, as Trustee, and Daniel T. Norton and Jacqueline T. Norton, his wife, *Plaintiffs,* vs. First National Bank in Albuquerque, et al., *Defendants.*	No. 21046
Donald R. Wheeler, Trustee, et al., *Plaintiffs,* vs. Santa Fe Pacific Railroad Company, et al., *Defendants.*	No. 25579

(Title of Action)
(FILED: June 19, 1969)

JUDGMENT

The above entitled action came on regularly for trial on January 16, 1968, as a consolidation of Cause No. 104117 originally filed in the Maricopa County Superior Court and transferred to the Yavapai County Superior Court as Cause No. 25579 and consolidated with Cause No. 21046 in the above entitled Court, the Court siting [sic] without a jury, a jury having been expressly waived. On June 21, 1968, the Court entered an order for partial judgment. Thereafter on September 10, 1968 and October 7, 1968, the Court heard evidence relative to the issue of damages. Briefs were thereafter filed. The Court entered its Findings of Fact

and Conclusions of Law and order for judgment on March 20, 1969. Pursuant to said order for judgment, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. That ERNEST O. BUHLER; MILDRED B. BUHLER, Executrix of the estate of ERNEST O. BUHLER, Deceased; MILDRED B. BUHLER; MAGINNIS & SON, a partnership; CHARLES PATRICK MAGINNIS; Unknown heirs or devisees of CHARLES PATRICK MAGINNIS, deceased; CHARLES HENRY MAGINNIS; Unknown heirs or devisees of CHARLES HENRY MAGINNIS, deceased; HUGO SEABERG; AGNES S. DeLAMBERT and the unknown heirs or devisees of HUGO SEABERG, deceased; T. B. WALKER; Unknown heirs or devisees of T. B. WALKER, deceased; W. E. MOSES LAND SCRIP & REALTY COMPANY, a corporation; Last surviving Directors of W. E. MOSES LAND SCRIP & REALTY COMPANY; W. H. PHIPPS; STEPHEN C. PHIPPS and the unknown heirs or devisees of W. H. PHIPPS, deceased; A. C. SOPER; TRUSTEES OF HAMILTON COLLEGE, and the unknown heirs or devisees of A. C. SOPER, deceased; CHARLES B. WILSON, JR., as Administrator of the Estate of CHARLES PATRICK MAGINNIS, deceased, and as Administrator of the Estate of CHARLES HENRY MAGINNIS, deceased; ARCHIE E. WALKER; JESSE W. SCHERMAN; DELLA BROOKS WALKER, a widow; BROOKS WALKER and MAJORIE WALKER WALKER, husband and wife; HARRIET W. HENDERSON and WELLINGTON SMITH HENDERSON, her husband; ALMA WALKER COE and JESSE W. COE, her husband; ALMA BROOKS WALKER, a widow; LEON B. WALKER and EVELYN WYNNE WALKER, husband and wife; FLETCHER L. WALKER and EVELINE S. WALKER, husband and wife; DANA C. SMITH and ROSAMOND

DuBOIS SMITH, husband and wife; WALKER SMITH and MARGUERITE B. SMITH, his wife; HULET P. SMITH and LOMA MOULTON SMITH, his wife; JUSTIN Y. SMITH; ARCHIE D. WALKER; BERTHA H. WALKER; STEPHEN C. PHIPPS; the TRUSTEES OF HAMILTON COLLEGE; WALTER ESTERQUIST, MRS. PAUL D. COOK and PAUL D. COOK, JR., as the last surviving Directors of the W. E. MOSES LAND SCRIP AND REALTY COMPANY; W. E. MOSES LAND SCRIP AND REALTY COMPANY, a corporation; AGNES S. DeLAMBERT; KENNETH D. MILLER, Trustee; OLIVE V. NAVARRE; and WILL ED HARRIS are entitled to no relief by virtue of any of their claims herein.

2. That FIRST NATIONAL BANK IN ALBUQUERQUE, as Trustee, is the owner of the N½ of Section 27, Township 22 North, Range 9 East, G&SRB&M, Coconino County, Arizona, and that all the parties to this action, and each of them, and all persons or corporations claiming or to claim under or through them be forever barred and foreclosed from any interest in and to the aforedescribed premises.

3. That SANTA FE PACIFIC RAILROAD COMPANY is the owner of the following described property:

NW/4 of Section 33, Township 30 N, Range 2 E, G&SRB&M, Coconino County, Arizona.

SE/4NE 4 of Section 17, Township 19 N, Range 5 E, G&SRB&M, Coconino County, Arizona.

NW/4 of Section 31, Township 19 N, Range 6 E, G&SR&M, Coconino County, Arizona.

NW/4SW/4 of Section 29, Township 20 N, Range 5 E, G&SRB&M; Coconino County, Arizona.

SW/4 NW/4 of Section 33, Township 20 N, Range 5 E, G&SRB&M, Coconino County, Arizona.

SW/4 NW/4 of Section 3, Township 27 N, Range 5 E, G&SRB&M, Coconino County, Arizona.
SE/4 NW/4 of Section 3, Township 27 N, Range 5 E, G&SRB&M, Coconino County, Arizona.
NW/4 NE/4 of Section 3, Township 27 N, Range 5 E, G&SRB&M, Coconino County, Arizona.
SW/4 NE/4 of Section 3, Township 27 N, Range 5 E, G&SRB&M, Coconino County, Arizona.
N/2 NW/4 of Section 5, Township 27 N, Range 3 E, G&SRB&M, Coconino County, Arizona.
Lot 12, Section 33, Township 21 N, Range 5 E, G&SRB&M, Coconino County, Arizona;

and that all the parties to this action, and each of them, and all persons or corporations claiming or to claim under or through them be forever barred and foreclosed from any interest in and to the aforedescribed premises.

4. That DANIEL F. NORTON, JR. and JACQUELINE T. NORTON, his wife, are the owners of the following described property:

Lot 1, Section 7, Township 15 N, Range 8 E, G&SRB&M, Coconino County, Arizona.
NE/4 SW/4 of Section 19, Township 15 N, Range 8 E, G&SRB&M, Coconino County, Arizona.
Lots 1 and 3, Section 31, Township 24 N, Range 3 E, G&SRB&M, Coconino County, Arizona.
N/2 NW/4 of Section 3, Township 27 N, Range 5 E, G&SRB&M, Coconino County, Arizona.
Lot 1, Section 19, Township 18 N, Range 8 E, G&SRB&M, Coconino County, Arizona.
NE/4 NE/4 of Section 17, Township 19 N, Range 5 E, G&SRB&M, Coconino County, Arizona.
SW/4 NE/4 of Section 17, Township 19 N, Range 5 E, G&SRB&M, Coconino County, Arizona.

SW/4 NE/4 of Section 23, Township 20 N, Range 5 E, G&SRB&M, Coconino County, Arizona;

and that all the parties to this action, and each of them, and all persons or corporations claiming or to claim under or through them be forever barred and foreclosed from any interest in and to the aforedescribed premises.

5. That E. L. CORD have judgment against the SANTA FE PACIFIC RAILROAD COMPANY in the amount of $200,000.00, together with interest thereon at the rate of six percent (6%) per annum from the date hereof until paid, together with his costs incurred herein.

6. That DONALD R. WHEELER, as Trustee, have judgment against the SANTA FE PACIFIC RAILROAD COMPANY in the amount of $59,472.00, together with interest thereon at the rate of six percent (6%) per annum from the date hereof until paid, together with his costs incurred herein.

7. That RICHARD M. LADE have judgment against the SANTA FE PACIFIC RAILROAD COMPANY in the amount of $32,000.00, together with interest thereon at the rate of six percent (6%) per annum from the date hereof until paid, together with his costs incurred herein.

8. That DANIEL F. NORTON, JR. and JACQUELINE T. NORTON, his wife, are entitled to no relief by virtue of their claims herein except as set forth in Paragraph 4 of this Judgment.

9. That DONALD R. WHEELER, as Trustee, is entitled to no relief by virtue of any of his claims herein except as set forth in Paragraph 6 of this Judgment.

DONE in open Court this 19th day of June, 1969.

/s/ Jack L. Ogg
Judge

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-255

SANTE FE PACIFIC RAILROAD COMPANY, a corporation,
Petitioner,

vs.

E. L. CORD and DONALD R. WHEELER, Trustee,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court and the Court of Appeals, of the State of Arizona.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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SUBJECT INDEX

	Page
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Supplemental Statement of Case	3
Argument	5
Reasons for Denying the Writ	5
1. The Judgment of the State Court Is Based Upon Adequate and Independent Non-Federal Grounds Not Subject to Review	5
2. There Is No Important or Substantial Question of Federal Law	7
3. There Is No Conflict of Decisions	10
Conclusion	12

TABLE OF AUTHORITIES CITED

Cases	Page
Black v. Cutter Laboratories, 351 U.S. 292, 298	6, 7, 8
Durley v. Mayo, 351 U.S. 277	7
Eustis v. Bolles, 150 U.S. 361	6
Henry v. State of Mississippi, 379 U.S. 443	6
Herb v. Pitcairn, 324 U.S. 117	7
Krug v. Santa Fe Pacific Railway Co., 329 U.S. 591	8, 10, 11, 12
Kryger v. Wilson, 242 U.S. 171	8
Murdock v. Memphis, 20 Wall. 590	6
Selover, Bates and Co. v. Walsh, 226 U.S. 112	8
Udall v. Battle Mountain Company, 385 F.2d 90, cert. den., reaff. Lade v. Udall, 432 F.2d 254	6

Statutes	
Forest Lieu Exchange Act of June 4, 1897, 30 Stat. 36	2, 5, 10
Forest Lieu Exchange Act of Aug. 31, 1964, 78 Stat. 151	9
Forest Lieu Exchange Act of Aug. 31, 1964, 78 Stat. 751	9
Transportation Act of 1940, Sec. 321 (b)	2
Transportation Act of 1940, 49 U.S.C. 65	5
United States Senate Report, Aug. 18, 1965, Bill S 2321	10

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-255

SANTE FE PACIFIC RAILROAD COMPANY, a corporation,
Petitioner,

vs.

E. L. CORD and DONALD R. WHEELER, Trustee,
Respondents.

On Petition for a Writt of Certiorari to the Supreme Court and the Court of Appeals, of the State of Arizona.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Respondents hereby file their brief in opposition to the Petition for Certiorari. The Petitioner Santa Fe Pacific Railroad Company—will be hereinafter referred to as "Santa Fe"; the Respondent E. L. Cord as "Cord", and the Respondent Donald R. Wheeler as Trustee as "Wheeler". Cord and Wheeler will sometimes hereinafter be referred to jointly as "Respondents".

Jurisdiction.

The judgment of the Superior Court of the County of Yavapai, State of Arizona, was entered on June 19, 1969 (A. 40) and an appeal was timely made to the Court of Appeals of the State of Arizona by Santa Fe on July 22, 1969. Thereafter on March 15, 1971, the said Court of Appeals affirmed the judgment of the

Superior Court of the County of Yavapai. (A. 3, 5.) On March 30, 1971, Santa Fe filed a Motion for Rehearing in the said Court of Appeals which Motion was denied on April 14, 1971. (A. 28.) On April 20, 1971, Santa Fe filed a Petition for Review to the Supreme Court of the State of Arizona, which Petition for Review was denied on June 9, 1971. (A. 1.)

This Court lacks jurisdiction as the State judgment was based upon non-federal grounds.

Questions Presented.

(1) Is the State Court Judgment based upon a breach of contract of sale, an independent non-federal ground adequate in itself to support the state court's judgment?

(2) Whether Forest Lieu Selection Rights arising under the Act of June 4, 1897 (30 Stat. 36) and based upon lands patented to Santa Fe by the U.S. Government not later than the year 1906 were terminated under the provisions of Sec. 321 (b) of the Transportation Act of 1940, and the release executed by Santa Fe pursuant to said Transportation Act?

Statute Involved.

The Forest Lieu Exchange Act of June 4, 1897 (30 Stat. 36):

> That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no

charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further,* That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

Supplemental Statement of Case.

Pursuant to the Forest Lieu Exchange Act of Congress, Santa Fe during the years 1902 to 1910 conveyed to the United States certain patented lands (hereinafter referred to as "base lands") to which it then had title, and in exchange therefor Santa Fe received from the United States, rights to select lands owned by the United States. Commencing during the year 1902 to 1917 Santa Fe sold all of their interest in these selection rights including the right to rescind the exchange with the Government, to third persons for a valuable consideration, impliedly warranting at the time of sale that Santa Fe would do nothing to impair, destroy or diminish the use of said rights. Cord and Wheeler subsequently became the owners of said rights sold by Santa Fe. During the years 1955, 1956 and 1957, at the request of Santa Fe, and without the knowledge and consent of Cord and Wheeler or their predecessors, the base lands which Santa Fe had conveyed to the Government in exchange for the Forest Lieu Selection Rights were reconveyed by the United States Government to Santa Fe. The Government refused to recognize Cord's and Wheeler's selection rights since the base lands had been reconveyed by the United States Government to Santa Fe.

All of the "base lands" reconveyed by the United States Government to Santa Fe which Santa Fe had not conveyed to third parties were awarded by the Trial Court to Santa Fe free and clear of any claims of Cord and Wheeler.

Cord and Wheeler filed suit against Santa Fe for damages, claiming breach of contract of sale and fraudulent conversion of personal property.[1]

Santa Fe only appealed from certain parts of the judgment of the Trial Court. First, as to the amount of damages awarded by the Trial Court to Cord and Wheeler (paragraphs 5 and 6, A. 44), and second, from that part of the judgment that held Santa Fe was the owner of certain base lands as described and referred to in the State Court Judgment. (Paragraph 3, A. 42).

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[1]The State Court rejected Respondent's claim of conversion of personal property and for punitive damages, and based its judgment upon breach of contract.

ARGUMENT.

REASONS FOR DENYING THE WRIT.

1. The Judgment of the State Court Is Based Upon Adequate and Independent Non-Federal Grounds Not Subject to Review.

Two Federal Statutes lurked in the background of this case, that is the Forest Lieu Exchange Act of 1897 (30 Stat. 36), and the Transportation Act of 1940 (49 U.S.C. 65). The controlling statute from which the claims of Cord and Wheeler arose or stemmed from is the said Forest Lieu Exchange Act. A decision on the question presented by Santa Fe for review by this Court was not essential to the State Court Judgment. It is apparent from the record that the judgment of the State Court was not based upon any provision of the Transportation Act of 1940. This was made clear in the opinion of the Appeals Court.

> "The claim which Cord and Wheeler had under the Act of June 4, 1897, 30 State. 36, *is a claim, separate and apart from any claims under the Transportation Act of 1940.* * * *" (A. 18.)

The subject matter of this controversy is not inherently federal. The theory of liability of the Trial Court as affirmed by the Court of Appeals was simply a breach of contract of sale. Santa Fe admits that it is liable only for a breach of contract and the sole cause of action in this case is one for breach of contract, and damages awarded accordingly. (Santa Fe's Reply Br., Appeals Court, pp. 24, 25 and 27.)

The Trial Court found that the Forest Lieu Selection Rights as sold by Santa Fe constituted binding and enforceable contracts of sale between Santa Fe and the owners of such rights, and their successors

and assigns. (Conc. #5, A. 38.) That at the time Santa Fe sold said rights it impliedly warranted that it would not do anything to impair, destroy or diminish such selection rights, (Con. #7, A. 38) and that Santa Fe breached the contract with the holders and owners of said rights when it took back the base lands from the United States Government and destroyed the rights to select other federal lands in exchange. [Fdg. #16, A. 36, and Conc. #8, A. 38.][2]

The Findings, Conclusions and Judgment of the State Court are amply supported by undisputed evidence, and we submit are inherently correct, and would not by themselves warrant review by this Court. On these facts the decision below is clearly correct.

Santa Fe does not contend that the State Courts erroneously construed or applied the Forest Lieu Statute, and therefore the State judgment is wrong and should be reviewed.

The established rule is that this Court will not review a State Court judgment based upon an adequate and independent non-federal ground, even though a federal question be involved: *Murdock v. Memphis*, 20 Wall. 590, 636; *Eustis v. Bolles*, 150 U.S. 361, 370; *Black v. Cutter Laboratories*, 351 U.S. 292, 298; *Henry v. State of Mississippi*, 379 U.S. 443.

It is clear that the state judgment is sustainable upon substantive state grounds.

The total effect of Santa Fe's petition is that this Court should review an opinion of the State Court of Appeals which discussed a federal question not ger-

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[2]In accord *Udall v. Battle Mountain Company*, 385 F.2d 90 (9th Cir. 1967, Cert. den) and reaffirmed in *Lade v. Udall*, 432 F.2d 254 (9th Cir.).

mane to the affirmance of the judgment of the Trial Court. (A. 14-19.)

The power of the Supreme Court is to correct a wrong judgment based on federal grounds, and not merely to revise opinions based on non-federal grounds. In *Black v. Cutter Laboratories,* 351 U.S. 292, 297-98, this Court stated:

> This Court, however, reviews judgments, not statements in opinions. * * * This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds.

See also *Herb v. Pitcairn,* 324 U.S. 117, 125.

In addition, one of the indirect purposes of Santa Fe's petition to this Court is an attempt to establish a defense based upon the Statute of Limitations of the State of Arizona, which is a purely local or state procedural matter, already decided by the State Court adversely to Santa Fe.

Santa Fe has not sustained the burden to estabblish jurisdiction of this Court, as Santa Fe has failed to demonstrate in its Petition that the State ground of breach of contract was not a substantial and sufficient ground to sustain the judgment below. *Durley v. Mayo,* 351 U.S. 277, 281.

2. There Is No Important or Substantial Question of Federal Law.

Manifestly there is no important or substantial question of Federal law constitutional or otherwise requiring a decision by this Court.

The construction of a local contract or an action for damages for breach of contract under local law does

not present a substantial federal question. *Black v. Cutter Laboratories*, 351 U.S. 292, 299; *Selover, Bates and Co. v. Walsh*, 226 U.S. 112; *Kryger v. Wilson*, 242 U.S. 171.

Santa Fe asserts in effect that this Court decided the importance of this question presented herein twenty-four years ago because this Court granted certiorari in the case of *Krug v. Santa Fe Pacific Railway Co.*, 329 U.S. 591 (1924) which involved a question arising under the Transportation Act of 1940 (Santa Fe's Point 1). This bold assumption that this Petition is therefore "Certworthy" is clearly erroneous thinking. This is a private controvery, not involving the U.S. Government arising out of a breach of contract, and this case, is not the same type of controversy presented in the *Krug* case of vital national importance affecting the title of the U.S. Government and homesteaders to a vast number of acres of lieu or indemnity lands arising out of land grants by Congress to seventy railroads almost equal in acreage to the size of the New England States, New York, and Pennsylvania combined.

Santa Fe has totally failed to show that the question presented is of any immediate or major importance or of wide import far beyond the particular facts and parties involved, and Santa Fe has failed to show in any manner why it is vital for this Court to finally decide the issue presented, except for Santa Fe's personal benefit.

Santa Fe has elected to file this Petition regardless of the fact that it admits liability to Cord and Wheeler and all that Santa Fe is endeavoring to do as the main thrust of its Petition is to have this Court rule otherwise on the effect of the Transportation Act and

the release executed thereunder, so that Santa Fe can reduce or mitigate its damages. In Santa Fe's brief filed in the Court of Appeals its position as to reducing or mitigating damages was made clear as Santa Fe stated:

> The court should hold that the lands Santa Fe received back from the United States and which it still holds, it holds in trust for Cord and Wheeler. * * * To the extent that any of such lands so received by the Santa Fe have been acquired by others than Santa Fe is subject to liability for the loss of such lands. (Santa Fe's Op. Br. p. 55.)

Santa Fe by second guessing to bolster its argument further asserts that issue presented is important as the Secretary of Interior should refuse to honor *unexercised* Forest Lieu Selection Rights under the Act of Aug. 31, 1964, (78 Stat. 151) if Santa Fe's position is correct, and accordingly the United States has an interest in obtaining a final answer on the issue raised: (Santa Fe's Point 3.) This is speculation and conjecture beyond the realm of actuality. A decision by this Court on the issue raised by Santa Fe on the utilization of *unrealized* Forest Lieu Rights on public lands is not important, but in fact is now moot and episodic.

No decision is needed on this issue by this Court, as Congress has already declared under Sec. 1 of the Act of August 31, 1964 (78 Stat. 751) that any unexercised Forest Lieu Selection Rights which shall not be satisfied by land patent or cash payment before January 1, 1970, "*shall become null and void.*" Therefore the Secretary of Interior would by mandate of Congress declare null and void any claim made for these unexercised selection rights after January 1, 1970.

Only 5073 acres of Forest Lieu Selection rights were recorded under the Act of August 5, 1955 (U.S. Senate Report on Bill S 2321 dated August 18, 1965). Approximately 1500 acres or 34% of these recorded rights were involved in this controversy. Presumably the small remaining balance of these unrealized selection rights were liquidated as provided in the August 31, 1964, Act prior to January 1, 1970, otherwise they are now null and void.

3. There Is No Conflict of Decisions.

Santa Fe claims a direct conflict of decisions between the Court of Appeals' opinion and the case of *Krug v. Santa Fe Railway Co.*, 329 U.S. 591. (Santa Fe's Point 2.) Such an assertion is a confrontation with hope, not fact or reality. The State judgment was based on breach of contract, not the *Krug* case or the Transportation Act of 1940. That there is no such conflict was made clear in the Appeals Court Opinion which stated: "The claim which Cord and Wheeler had * * * is a claim separate and apart from any claims under the Transportation Act of 1940." (A. 18.) The State Court judgment does not conflict in any way with the *Krug* case.

The Forest Lieu Exchange Act was not a grant of land to anyone and not to a railroad as such. (30 Stat. 36) As the Court of Appeals noted in its opinion the Forest Lieu Exchange Act "pertained to railroads and private individuals alike, whereas the Transportation Act of 1940 was dealing only with railroads *as a railroad*", and land grants in aid of construction of railroads.

While the Appeals Court did discuss the *Krug* case and the Transportation Act, nothing in its opinion was

contrary to the principles enunciated by this Court in the *Krug* case, and as limited to the facts of that case.

In the well-considered and reasoned legal opinion, the Appeals Court correctly held that the *Krug* case and the Transportation Act were not applicable to the facts of this case (A. 14-19.) There is a definite distinction between unperfected rights (claims for indemnity or lieu lands) arising out of floating land grants to railroads in aid of the construction thereof, and rights arising out of or incident to previously patented government lands used as the basis for the Forest Lieu Exchanges. The Transportation Act and the release of Santa Fe expressly expected *lands which had been previously patented,* and the Appeals Court so held in its opinion. This construction was in accord with the construction placed thereon by the Secretary of Interior as approved by this Court in the *Krug* case, that releases in conformity with the Transportation Act were broad, incluuding all rights growing out of, or arising from the grants, *except* three types of claims specifically excluded therefrom, one of the types being *patented lands.* (Pet. Br. p. 15.) Further, Santa Fe admits that "there was no release of the base lands which had been previously patented" (that is by the U.S. Government to Santa Fe) "nor was one required under the Act." [Santa Fe's Post-trial Memo, p. 10, R. 178.]

The Forest Lieu Exchange Act created separate and distinct claims or rights divorced by statutory enactment from any claim for "compensation or reimbursement" under the Transportation Act because no such claim did or could exist based on lands which had been theretofore patented to Santa Fe by the Government and which were expressly excluded from the Transportation Act. Nothing remained for the Government to

do to reimburse Santa Fe as "compensation or reimbursement", since the patented lands had already been deeded to Santa Fe in fulfillment of the contractual obligation of the Government under the original land grant.

It is apparent from the record that Cord and Wheeler did not raise the same arguments in this litigation as those raised in Santa Fe in the *Krug* case as an entirely different factual situation existed, that is, patented lands were involved in this controversy which were used as the basis for the Forest Lieu Selection Rights while the *Krug* case involved inchoate, unperfected lieu or indemnity selections under floating grants made specifically to railroads in aid of construction thereof.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied and that this Court lacks jurisdiction as the State Court judgment was based upon adequate and independent non-federal grounds.

Respectfully submitted,

EDWARD D. NEUHOFF,

Counsel for Respondents.